Rule 2-81 Jno. Davis
11
1876

REMITTITUR.

SUPREME COURT OF THE UNITED STATES.

No. 208.

JAMES O'BRIEN, PLAINTIFF IN ERROR,

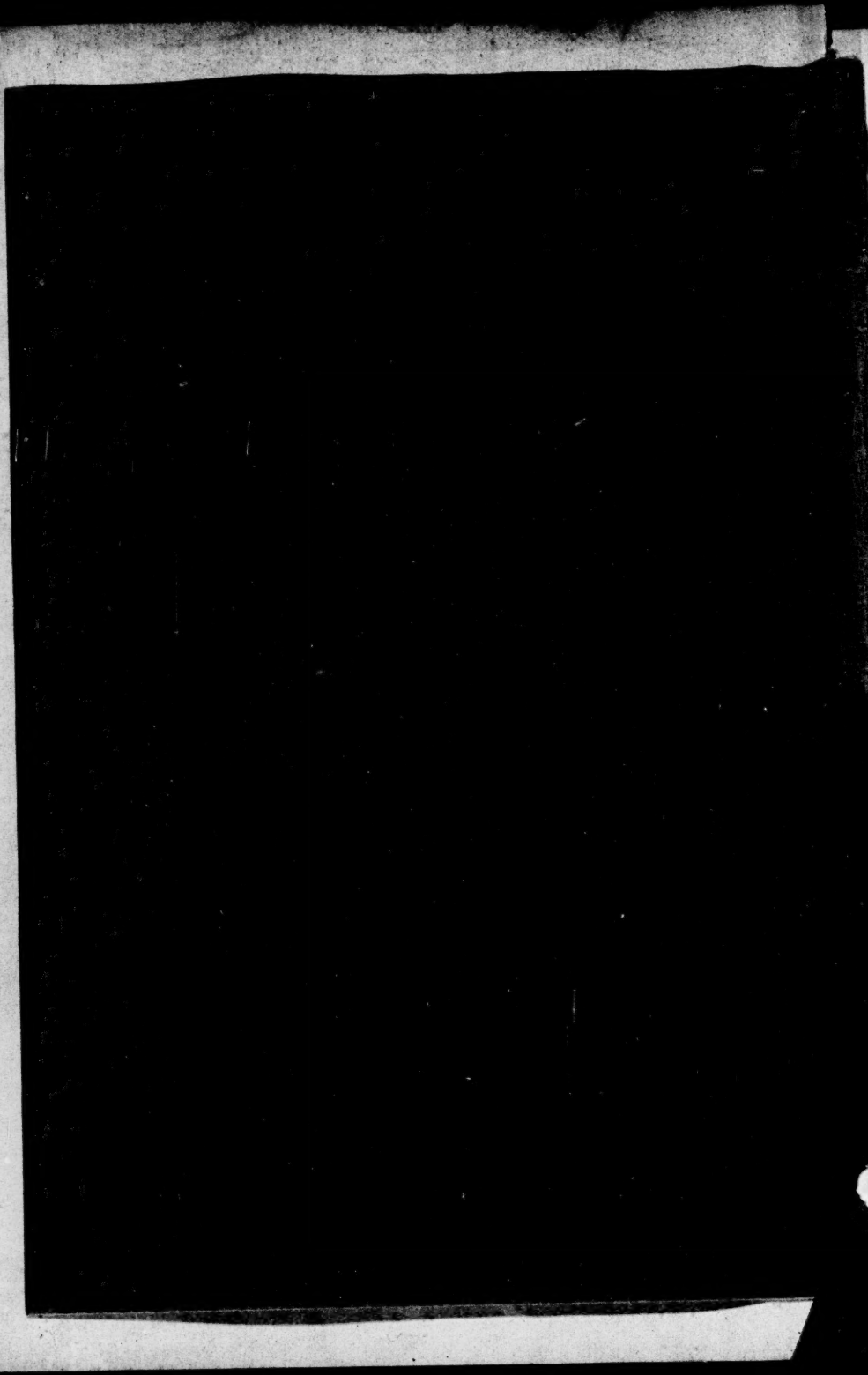
vs.

GEORGE M. WELD, HENRY W. NAGLE, AND EDWIN SHERWIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 20, 1874.

Reversed -
Jno Hunt
to write



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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	2
Bond	5	2
Clerk's certificate	7	4
Complaint	10	5
Answer	12	6
Judgment	27	13
Appeal	28	14
Judgment, court of appeals	34	17
Clerk's certificate	35	17
Final judgment	38	18
Opinion	40	18

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of New York, in the first judicial department of said State, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, having thereto been remitted by the court of appeals of said State, after the decision rendered by the said court of appeals by the judges thereof, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between George M. Weld, Henry W. Nagle, and Edwin Sherwin, plaintiffs and respondents, and James O'Brien, sheriff of the city and county of New York, defendant and appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the Uni-
2 ted States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant & appellant, James O'Brien, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court, the 31st day of October, in the year of our Lord one thousand eight hundred and seventy-three.

Issued 31st Octo., 1873.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

WARD HUNT,
Associate Justice Supreme Court U. S.

(Indorsed:) U. S. Supreme Court. James O'Brien, plaintiff in error, vs. George M. Weld et al., defendants in error. Writ of error. Brown, Hall & Vanderpoel, attys. for plaintiff in error.

Copy of the within was lodged on November 18, 1873, for the use of the defendants in error.

Filed November 18, 1873.

CHAS. E. LOEW, *Clerk.*

3 THE UNITED STATES OF AMERICA:

To George M. Weld, Henry W. Nagle, and Edwin Sherwin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York in and for the first judicial department, wherein James O'Brien, sheriff of the city and county of New York, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Ward Hunt, associate justice of the Supreme Court of the United States, this thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-three.

WARD HUNT,
Associate Justice Supreme Court U. S.

4 On this 20th day of November, in the year of our Lord one thousand eight hundred and seventy-three, personally appeared James P. Niemann, before me, the subscriber, a notary public in and for the city and county of New York, and within said city and county and State of New York, and makes oath that he delivered a true copy of the within citation to Granville P. Hawes, esq., the attorney for George M. Weld, Henry W. Nagle, and Edwin Sherwin, the plaintiffs in the judgment in said within citation referred to, on the 19th day of November, 1873.

JAMES P. NIEMANN.

Sworn to and subscribed the 20th day of November, A. D. 1873.

P. F. HASCALL,
Notary Public N. Y. Co.

(Indorsed:) U. S. Supreme Court. James O'Brien, plaintiff in error, vs. George M. Weld et al., defendants in error. Citation. Brown, Hall & Vanderpoel, atty's. for plaintiff in error.

Personal service of a copy of the within citation is hereby admitted. Dated Nov. 19, 1873.

GRANVILLE P. HAWES, *Plff's. Atty.*

5 Know all men by these presents that we, James Everard, contractor, residing at No. 307 East Fortieth street, in the city of New York, and Francis M. Bixby, store-house keeper, residing at No. 501 Fifth avenue, in said city, are held and firmly bound unto George M. Weld, Henry W. Nagle, and Edwin Sherwin in the full and just sum of fifteen thousand dollars, to be paid to the said George M. Weld, Henry W. Nagle, and Edwin Sherwin, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of October, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately, at a term of the court of appeals of the State of New York, in a suit depending in said court between George M. Weld, Henry

W. Nagle, and Edwin Sherwin, plaintiffs and respondents, and James O'Brien, sheriff of the city and county of New York, defendant and appellant, judgment was rendered against the said James O'Brien, sheriff, &c., appellant and defendant as aforesaid, affirming a judgment of the general term of the supreme court, first judicial department of the State of New York, in said action, and the said James O'Brien having obtained a writ of error from the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the supreme court of the State of New York in and for the first judicial department in said State, where the said judgment, record, and proceedings of said court of appeals are and remain of record, to reverse the judgment in the aforesaid suit, and a citation directed to the said George M. Weld, Henry W. Nagle, and Edwin Sherwin, cited and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said James O'Brien shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES EVERARD. [L. S.]
FRANCIS M. BIXBY. [L. S.]
[L. S.]

Sealed and delivered in presence of—
R. E. STILWELL,
U. S. Comr.

Approved by—

WARD HUNT,
Associate Justice Sup. Ct. U. S.

6 UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this thirtieth day of October, in the year one thousand eight hundred and seventy-three, before me, personally came James Everard and Francis M. Bixby, to me known to be the same persons described in and who executed the foregoing bond, and thereupon they severally acknowledged to me that they executed the same.

R. E. STILWELL,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James Everard, above named, being duly sworn, says that he is a resident of the State of New York, as mentioned in the within bond, and a freeholder therein, and that he is worth double the sum specified in the said bond over all his debts and liabilities, and all property exempt from execution.

JAMES EVERARD.

Sworn to before me this 30 day of October, 1873.

R. E. STILWELL,
U. S. Comr.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Francis M. Bixby, above named, being duly sworn, says that he is a resident of the State of New York, as mentioned in the within bond, and a freeholder therein, and that he is worth double the sum specified in the said bond over all his debts and liabilities, and all property exempt from execution.

FRANCIS M. BIXBY.

Sworn to before me this 30th day of October, 1873.

R. E. STILWELL,
U. S. Comr.

I, R. E. Stilwell, deputy clerk of the circuit court of the United States for the southern district of New York, do hereby certify that, in addition to the affidavits made by the sureties hereto annexed, I have examined them personally as to their responsibility, and believe them to be perfectly good and responsible for the within-named amount.

[SEAL.] R. E. STILWELL,
Deputy Clerk of the Circuit Court of the U. S. for the S. D. of N. Y.

(Indorsed:) U. S. Supreme Court. James O'Brien, plaintiff in error, against George M. Weld et al., defendants in error. Copy. Bond in error. Brown, Hall & Vanderpoel, attorneys for plaintiff in error, 291 Broadway, New York.

7 The answer of the judges of the supreme court of the State of New York for the first judicial department of said State, the same being a court of record.

A transcript of the record and judgment of this court, together with all things touching or in any wise concerning the same.

We certify, under the seal of our said court, to the justices of the Supreme Court of the United States as within we are commanded.

By the court.

[SEAL.] WM. WALSH, *Clerk.*

8 Court of appeals of the State of New York, on appeal from supreme court, first department.

GEORGE M. WELD AND OTHERS, RESPONDENTS,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, appellant. } Case on appeal.

Brown, Hall & Vanderpoel, attorneys for appellant; Granville P. Hawes, attorney for respondents.

9 Supreme court.

GEORGE M. WELD ET AL.
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York. } Case and exceptions on appeal.

The pleadings in this action are as follows:

Summons for a money demand on contract.

Supreme court.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, plaintiffs,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, defendant.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve

a copy of your answer to the said complaint on the subscribers at their office, number 170 Broadway, New York, within twenty days after the service hereof, exclusive of the day of such service; and if you
10 fail to answer the complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of four thousand four hundred and four $\frac{72}{100}$ dollars, with interest from the seventeenth day of May, one thousand eight hundred and seventy, besides the costs of this action.

Dated June 21st, 1870.

HAWES & WARDELL,
Plaintiffs' Attorney'.

Supreme court, city and county of New York.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.

The complaint of the plaintiffs respectfully shows to this court—

I. That at the times hereinafter mentioned, the defendant was sheriff of the city and county of New York; that on the 17th day of March, 1870, at New York City, an execution, then duly issued in form and effect, as required by law, against the property of one Albert Wiltse and one Frederick Wiltse, and in favor of the plaintiffs, upon a judgment for the sum of twelve hundred and forty-seven $\frac{89}{100}$ dollars, theretofore duly given in favor of the plaintiffs against said Frederick Wiltse and Albert Wiltse, in the supreme court of the State of New York, was by
11 the plaintiffs directed and delivered to the defendant as such sheriff.

II. That on the 18th day of March, 1870, at New York City, a certain other execution, then duly issued in form and effect, as required by law, against the property of said Albert Wiltse and Frederick Wiltse, and in favor of the plaintiffs, upon a judgment for the sum of twelve hundred and ninety-five $\frac{55}{100}$ dollars, theretofore duly given in favor of the plaintiffs and against said Albert Wiltse and Frederick Wiltse, in the supreme court of the State of New York, was by the plaintiffs directed and delivered to the defendant as such sheriff.

III. That on the 18th day of March, 1870, at New York City, a certain other execution, then duly issued in form and effect, as required by law, against the property of said Frederick Wiltse, and in favor of the plaintiffs, upon a judgment for the sum of five thousand four hundred and thirty-eight $\frac{94}{100}$ dollars, theretofore duly given in favor of the plaintiffs against said Frederick Wiltse, in the supreme court of the State of New York, was by the plaintiffs directed and delivered to the defendant as such sheriff.

IV. That the defendant thereafter, as such sheriff, collected and received upon said executions, to the use of the plaintiffs, the sum of four thousand four hundred and four $\frac{72}{100}$ dollars, besides his lawful fees and expenses.

V. That although more than sixty days elapsed after the delivery of said executions to the defendant before this action, yet he has, in violation of his duty as such sheriff, failed to pay over to the plaintiffs the amount so collected.

Wherefore, plaintiffs demand judgment against defendant for the

four thousand four hundred and four $\frac{72}{100}$ dollars, with interest thereon from the 17th day of May, 1870, besides the costs of this action.

HAWES & WARDELL,
Plaintiffs' Attorneys.

12 CITY AND COUNTY OF NEW YORK, *ss:*

George M. Weld, being duly sworn, says he is one of the plaintiffs in this action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true.

GEORGE M. WELD.

Sworn to before me this 22d day of June, 1870.

WILLIAM C. LUSK,
Notary Public for New York Co., N. Y.

Supreme court, city and county of New York.

Answer.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, plaintiffs,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, defendant.

The defendant, James O'Brien, sheriff, &c., appearing herein by Brown, Hall and Vanderpoel, his attorneys, and answering the complaint of the plaintiffs—

Admits that he was at the times mentioned in the complaint, and now is, sheriff of the city and county of New York.

13 And, further answering, defendant denies any knowledge or information sufficient to form a belief, as to any of the other allegations in the first clause or subdivision of said complaint contained, except that he admits that at or about the time in that behalf in the complaint alleged he received a certain paper, directed to him as sheriff of the city and county of New York, purporting to be an execution, and to be based upon a judgment similar to the one in the complaint set forth, and to have been issued out of this court, but defendant denies any knowledge or information sufficient to form a belief whether said pretended execution ever had any force or vitality in law.

And answering the second clause or subdivision of said complaint, defendant denies any knowledge or information sufficient to form a belief as to any of the allegations therein contained, except that he admits that at or about the time in that behalf therein alleged he received a certain paper, directed to him as sheriff, as aforesaid, purporting to be an execution, and to be based upon a judgment similar to the one in said second clause or subdivision of said complaint set forth, and to have been issued out of this court, but defendant denies any knowledge or information sufficient to form a belief whether said pretended execution ever had any force or vitality in law.

And answering the third clause or subdivision of said complaint, defendant denies any knowledge or information sufficient to form a belief as to any of the matters therein contained, except that the defendant admits that at or about the time in said third clause or subdivision alleged the defendant received a certain paper, directed to him as sheriff

as aforesaid, purporting to be an execution, and to be based upon a judgment similar to the one in said third clause or subdivision set forth, and to have been issued out of this court, but defendant denies any knowledge or information sufficient to form a belief whether said pretended execution ever had any force or vitality in law.

And, further answering, defendant denies each and every of the other allegations in said complaint contained.

Defendant denies that, by reason of the matters in the com-
14 plaint set forth, or of any act or acts of this defendant, the plaintiff is entitled to the judgment in the complaint prayed for, or to any judgment or relief in the premises.

Second defence. And, further answering, and for a second separate and distinct defence to the matters in the complaint contained, defendant avers that under and by virtue of the said several pretended executions hereinbefore mentioned, and forthwith upon the receipt of the same, he levied upon and took into his possession certain property, which appeared to belong to Frederick Wiltse and Albert Wiltse, therein mentioned, or to one of them.

And, further answering on information and belief, defendant avers that on or about the twenty-fourth day of March, one thousand eight hundred and seventy, Elisha A. Packer presented to the district court of the United States for the southern district of New York a petition praying that the said Frederick Wiltse be declared bankrupt. That thereupon, and on the same day, an injunction was issued out of the said district court, and thereafter served upon this defendant, a copy of which is hereto annexed, marked "A," and made part of this answer.

That in the said proceeding to have said Frederick Wiltse declared bankrupt, such proceedings were had thereafter, and upon the petition of the plaintiffs herein, that on or about the sixth day of April, one thousand eight hundred and seventy, an order was duly made by said district court of the United States for the southern district of New York, and thereafter served upon this defendant, of which a copy is hereto annexed, marked "B," and made part of this answer.

That in said proceeding to have said Frederick Wiltse declared bankrupt, such further proceedings were had that on or about the seventh day of April, one thousand eight hundred and seventy, an order was made in said United States district court, and thereafter duly served upon this defendant, a copy of which is hereto annexed, marked "C," and made part of this answer.

That in said proceedings in said district court of the United
15 States to have said Frederick Wiltse declared a bankrupt, such further proceedings were had that an order was duly made by said court, on or about the eleventh day of April, one thousand eight hundred and seventy, and thereafter duly served on this defendant, of which a copy is hereto annexed, marked "D," and forms part of this answer.

That, under and in obedience to said orders of said district court of the United States for the southern district of New York, hereto annexed, marked "B" and "D," respectively, this defendant, after giving the notice therein required, proceeded to sell, and did sell, the property theretofore levied upon by him, being the identical property mentioned and described in the said last-mentioned orders of the said district court of the United States.

That, after deducting defendant's legal fees and costs in respect to such executions and sale, there remained in his hands the sum of four thousand five hundred and four $\frac{72}{100}$ dollars, which sum this defendant

thereafter paid over, as by said orders directed, to the clerk of the district court of the United States for the southern district of New York.

Wherefore this defendant demands judgment for the dimissal of the complaint herein and for his costs and disbursements of action.

BROWN, HALL & VANDERPOEL,
Attorneys for Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

James O'Brien, sheriff of the city and county of New York, being duly sworn, deposes and says: The foregoing answer is true, to my own knowledge, except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

JAMES O'BRIEN, *Sheriff.*

Sworn to before me this 9th day of September, 1870.

F. P. DONOVAN,
Commissioner of Deeds, N. Y.

16 A.

The President of the United States of America to Frederick Wiltse, debtor, and to his counsellors, attorneys, solicitors, and agents, [L. S.] and to the sheriff of the city and county of New York, to George M. Weld, Henry W. Nagle, and Edwin Sherwin, and all other persons, greeting:

Whereas Elisha Packer has lately presented to the district court of the United States for the southern district of New York a petition praying that the said debtor be declared bankrupt:

Whereupon an order was granted requiring the said debtor to show cause before the said court, on the 2d day of April, 1870, why the prayer of the said petitioners should not be granted; and it appearing to the court that a proper case exists:

Now, therefore, you and each of you are commanded to absolutely desist and refrain, until the hearing and decision on the said petition and until the further order of the court, from making any transfer or disposition of any of the property of the said debtor, Frederick Wiltse, not exempted by the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, from the operation of the said act and from any interference therewith, except to preserve the same, until the further order of the court.

Witness honorable Samuel Blatchford, judge of the said court, at the United States court-rooms, in the city of New York and district aforesaid, this 24th day of March, 1870.

GEORGE F. BETTS, *Clerk.*

17 B.

United States district court for the southern district of N. Y.

IN THE MATTER OF FREDERICK WILTSE, a bankrupt. } In bankruptcy.

A petition having been presented to the Hon. Samuel Blatchford, judge of this court, by George M. Weld, Henry W. Nagle, and Edwin Sherwin, asking that the injunction issued herein may be so far vacated

or modified as to allow the sheriff of the city and county of New York to sell the property levied on by him previous to the filing of the petition in bankruptcy against the above-named Frederick Wiltse, under or by virtue of executions issued to him on judgments against said Frederick Wiltse, and in favor of said George M. Weld, Henry W. Nagle, and Edwin Sherwin, and an order having been duly granted requiring the creditors filing the last-named petition against said Frederick Wiltse, or his attorney, to show cause before this court why the prayer of said petitioners should not be granted, and a copy of said last-named petition and order having been duly served on R. H. Huntley, esq., attorney for said petitioning creditors, and the same coming on to be heard, after hearing G. P. Hawes, esq., of counsel for said Weld, Nagle, and Sherwin, in support of said motion, and R. H. Huntley, esq., of counsel for said petitioning creditors, in opposition thereto, after due deliberation having been had thereon—

18 It is ordered that the injunction granted and issued herein be, and the same is hereby, so far modified, as to the sheriff of the city and county of New York and George M. Webb, Henry W. Nagle, and Edwin Sherwin, as to permit the said sheriff, and hei s directed, to sell the property of said Frederick Wiltse, levied on by him previous to the 24th day of March, the day of the filing of the said petition in bankruptcy against said Frederick Wiltse, under the execution issued to said sheriff on judgments in favor of said George M. Weld, Henry W. Nagle, and Edwin Sherwin, on giving, in addition to the notice required by the laws of the State of New York on sales of personal property on execution, notice by advertisement, to be published for five days immediately prior to such sale in the New York Daily Times and the Commercial Advertiser, newspapers published in the city of New York.

And it is further ordered that said sheriff pay over the money received from the sale of such property, after deducting his legal fees and costs in respect of such execution and sales, to be taxed on due notice to said Hawes and said Huntley, to the clerk of this court, and await the further order of this court.

Witness the Hon. Samuel Blatchford, of the said court, and the seal thereof, at the city of New York, in said district, this 6th day of July, A. D. 1870.

[L. S.] GEO. F. BETTS, *Clerk.*

A true copy of the original order on file.

[L. S.] GEO. F. BETTS, *Clerk.*

19 C.

In the district court of the United States for the southern district of New York.

IN THE MATTER OF FREDERICK WILTSE, bankrupt. } In bankruptcy, No. 2708.

At the city of New York, in the said district, on the 7th day of April, A. D. 1870.

On the affidavits of Elisha A. Packer and Frederick Wiltse, filed herein, and on motion of Richard H. Huntley, esq., attorney for the petitioning creditor herein, it is hereby ordered and adjudged that an injunction issue out of and under the seal of the said court, to restrain

the sheriff of the city and county of New York from exposing to sale or selling, making any transfer or disposition of the following described property, viz: A certain coal-yard, and all the fixtures and appurtenances thereof, and all the coal therein, situated on the corner of 14th street and Avenue D, in the city of New York, the property of the above-named bankrupt, but nominally the property of one Albert Wiltse, and which property was seized and levied upon by the said sheriff on or about the 17th or 18th days of March, 1870, under executions issued to the said sheriff, in pursuance of judgments entered in favor of Weld, Nagle & Co. against the said Frederick Wiltse and Albert Wiltse.

And also to restrain George M. Weld, Henry W. Nagle, and Edwin Sherwin, and each and every of them, from making any transfer or disposition of the above-described property.

20 Witness the honorable Samuel Blatchford, judge of said court, and the seal thereof, at the city of New York, in said district, this 7th day of April, A. D. 1870.

[L. S.] GEORGE F. BFTTS,
Clerk.

A true copy of the original order on file.

GEORGE F. BETTS,
Clerk.

D.

United States district court, southern district of New York.

IN THE MATTER OF FREDERICK WILTSE, a bankrupt.

A petition having been presented to the Hon. Samuel Blatchford, judge of this court, by George M. Weld, Henry W. Nagle, and Edwin Sherwin, asking that the injunction issued herein, restraining said petitioners and the sheriff of the city and county of New York from selling or transferring the property of Albert Wiltse, levied on by said sheriff under executions held by him, and a motion having been made by said petitioners, on notice to the attorney for the petitioning creditors herein that the prayer of said petitioners be granted—

21 On hearing G. P. Hawes, of counsel for said petitioners, in support of said motion, and R. H. Huntley, esq., of said petitioning creditors herein, in opposition thereto, and due deliberation having been had thereon,

It is ordered that the injunction granted and issued herein, restraining said George M. Weld, Henry W. Nagle, and Edwin Sherwin, and the sheriff of the city and county of New York, from selling or transferring the property of Albert Wiltse, be, and the same hereby is, so far vacated and modified as to said sheriff as to allow and permit the said sheriff, and he is directed, to sell the property mentioned in said injunction, levied on by him previous to the 21st day of March, 1870, under executions in his hands, on giving, in addition to the notice required by the laws of the State of New York on sales of personal property on excution, notice by advertisement, to be published for five days immediately prior to such sale in the New York Daily Times and the Commercial Advertiser, newspapers published in the city of New York.

And it is further ordered that said sheriff pay over the money received from the sale of such property, after deducting his legal fees and costs

in respect of such execution and sales, to be taxed on due notice to said Hawes and said Huntley, to the clerk of this court, to the credit of this proceeding.

Witness the Hon. Samuel Blatchford, judge of the said court. and the seal thereof, at the city of New York, in the said district, this 11th day of April, 1870.

[L. S.] GEORGE F. BETTS, *Clerk.*

A true copy of the original on file.

GEORGE F. BETTS, *Clerk.*

22 Supreme court.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.

The plaintiffs in this action hereby demur to the second defence stated in the answer of the defendant in this action, for the reason that the said second defence does not upon its face constitute a counterclaim or defence to plaintiffs' complaint in this action.

Dated September 23d, 1870.

HAWES & WARDELL,
Plaintiffs' Attorneys.

To BROWN, HALL & VANDERPOEL,
Defendant's Attorneys.

The issue of law raised by the plaintiffs' demurrer having first been decided by the general term of this court in favor of the plaintiffs, (said general term having reversed the special-term order overruling the said demurrer, as will more fully and at large appear by the judgment-roll herein,) the issues of fact joined by the pleadings came on for trial before the Hon. John T. Brady and a jury on the *the* 17th day of June, 1872.

JOHN MCQUADE, a witness called by the plaintiff, being duly sworn, testified as follows:

I am an officer in the county clerk's office, and brought these papers (referring to the judgment-rolls and executions mentioned in the complaint) from the files of that office.

23 (The witness here produced the said judgment-rolls and executions, and the same were read in evidence by the plaintiffs' counsel, but as no question arises upon the same, either as to regularity or validity, they are by consent omitted from this case for sake of brevity.)

The plaintiffs here rested.

The defendant then called as a witness Charles W. Welch, and offered to prove the allegations set forth in the second defence of his answer, and separately offered to prove each and every of said allegations.

(The plaintiffs' counsel objected thereto, and objected to any proof being given under said allegations, or either of them, on the ground that they constituted no counterclaim or defence to the plaintiffs' action.

Both parties thereupon admitted that the plaintiff had demurred to said second defence, on the ground that it did not on its face constitute a counterclaim or defence to plaintiffs' complaint, and that the general term had reversed an order overruling said demurrer made by the special term. The court sustained such objection of the plaintiffs, and excluded the evidence and every part thereof so offered by the defendant; to which ruling and decision of the court, and each and every part of the same, the defendant, by his counsel, then and there duly excepted.)

The evidence here closed.

The court then directed the jury to find a verdict for the plaintiffs for the sum of $5,096.58.

(To which direction of the court the defendant, by his counsel, then and there duly excepted.)

The jury thereupon brought in a verdict in accordance with the direction of the court.

24 *Judgment-roll*

(The summons, complaint, answer, and demurrer herein, having already been printed, are here, for the sake of brevity, omitted.)

Supreme court.

At a special term of the supreme court, held at the court-house in the city and county of New York, on the third day of October, one thousand eight hundred and seventy.

Present, Hon. George G. Barnard, justice.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.

The demurrer of the plaintiffs to the second defence in the answer of the defendant in the above-entitled action coming on to be heard, and G. P. Hawes, esq., of counsel for the plaintiffs, having been heard in support of said demurrer, and Aaron J. Vanderpoel, esq., of counsel for the defendant, in opposition thereto—

Ordered, that the said demurrer be overruled, with costs of the demurrer to the defendant, to abide the event of the action.

(A copy.)

CHARLES E. LOEW, *Clerk.*

25 Supreme court.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.

GENTLEMEN: You will please take notice that the plaintiffs above-named hereby appeal to the general term of the supreme court from the order, and every part of the same, made in this action, dated the 3d

day of October, 1874, and overruling the demurrer of the plaintiffs to the second defence in the answer of the defendants herein.

Dated October 10th, 1870.

Yours, &c.,

HAWES & WARDELL,
Plaintiffs' Attorneys.

To BROWN, HALL & VANDERPOEL,
Defendant's Attorneys.

CHARLES E. LOEW,
County Clerk.

At a general term of the supreme court, held in and for the first department, at the court-house, in the city and county of New York, on the 24th day of December, 1871.

26 Present, Hon. Daniel P. Ingraham, presiding justice; Hon. Albert Cardozo, justice.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, appellants,
agst.
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, respondent.

This cause coming on for argument, on the appeal from the order of the special term overruling the demurrer of the plaintiffs to the second defence in the answer of the defendant herein:

On hearing G. P. Hawes, of counsel for plaintiffs, and J. Sterling Smith, esq., of counsel for the defendant—

Ordered, that the said order of the special term be, and the same hereby is, reversed, and that the said demurrer be, and the same hereby is, sustained, with costs of the said demurrer and of this appeal to the plaintiffs.

(A copy.)

CHARLES E. LOEW, *Clerk.*

Supreme court.—Circuit.

GEO. M. WELD ET AL. *vs.* JAMES O'BRIEN. } June 17, 1872.

Present, Hon. John R. Brady, justice.

27 I hereby certify that this cause was this day tried by the court and a jury, and a verdict rendered for plaintiffs for the sum of ($5,096.58.)

By direction of the court, stay of proceedings thirty days to defendants, to make a case and exceptions. Extra allowance to plaintiffs of one hundred and twenty-five dollars granted.

CHARLES E. LOEW, *Clerk.*

Supreme court, city and county of New York.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.

The plaintiffs in this action having demurred to the second defence

stated in the answer of the defendant in this action, and said demurrer having been overruled at a special term of this court, and upon an appeal taken by the plaintiffs in this action to the general term of this court from the order overruling said demurrer, said order of the special term having been reversed, and said demurrer having been sustained, with costs of said demurrer and of the appeal to the plaintiffs, and the costs of said demurrer and of said appeal having been taxed at one hundred and forty-eight dollars and thirty-eight cents, and the issues of this action having thereafter been brought on for trial before Mr. Justice John R. Brady and a jury at a circuit court held on the first Monday of June, 1872, and the issues having been tried and a verdict for the plaintiffs having been duly rendered by direction of the court on
28 the 17th day of June, 1872, and their costs having been adjusted at two hundred and twenty-five dollars and fifty-two cents: Now, on motion of Grenville P. Hawes, esq., for said plaintiffs, it is adjudged that the plaintiffs, George M. Weld, Henry W. Nagle, and Edwin Sherwin, recover of the defendant, James O'Brien, one hundred and forty-eight dollars and thirty-eight cents, costs of said demurrer and appeal, and five thousand and ninety-six dollars and fifty-eight cents, found by the jury, with two hundred and twenty-five dollars and fifty-two cents costs, and eighty-nine dollars and nineteen cents interest on the verdict, amounting in the aggregate to five thousand five hundred and fifty-nine dollars and sixty-seven cents.

(Endorsed:) Filed Sept. 14th, 1872, at 11 h. and 5 m.

New York supreme court.

Notice of appeal to general term.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, respondents,
agst.
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, appellant.

You will please take notice that the defendant, James O'Brien, sheriff, &c., hereby appeals to the general term of this court from the judgment entered herein in favor of said plaintiffs and against this defendant, on the 14th day of September, 1872, for the sum of five thousand five hundred and fifty-nine dollars and sixty-seven cents, ($5,559.67,)
29 damages and costs, and from each and every part of said judgment.

Dated New York, October 12th, 1872.

BROWN, HALL & VANDERPOEL,
Attorneys for Appellant.

To Messrs. HAWES & WARDELL,
Respondents' Attorneys.

CHARLES E. LOEW, Esq., *Clerk.*

At a general term of the supreme court of the State of New York, held in and for the first department, in the city and county of New York, at the court-house in said city, on the 27th day of Nov., 1872.

Present, Hon. D. P. Ingraham, pr. justice; Hon. William H. Leonard and Hon. Learned, justices.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, respondents,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, appellant.

The appeal from the judgment entered in this action on the 14th day of September, 1872, in favor of the plaintiffs and respondents and against the defendant and appellant, coming on to be heard :

30 Now, on hearing J. Sterling Smith, esq., of counsel for defendant and appellant, and Granville P. Hawes, esq., of counsel for plaintiffs and respondents, it is ordered that the said judgment be, and the same is hereby, affirmed, with costs to the plaintiffs and respondents, against the defendant and appellant.

(A copy.)

CHAS. E. LOEW,
Clerk.

Supreme court, city and county of New York.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, respondents,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, appellant.

The appeal from the judgment entered in this action on the 14th day September, 1872, in favor of the plaintiffs and respondents, and against the defendant and appellant, having been heard at a general term of this court, and an order affirming said judgment, with costs, having been made:

Now, on motion of Granville P. Hawes, esq., it is adjudged that the plaintiffs and respondents, George M. Weld, Henry W. Nagle, and Edwin Sherwin, do recover of the defendant and appellant, James O'Brien, sheriff of the city and county of New York, the sum of seventy-one dollars and seventy-one cents costs, as taxed.

31 New York supreme court.

Notice of appeal to court of appeals.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, respondents,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, appellant.

GENTLEMEN: Please take notice that the defendant and appellant above named hereby appeals to the court of appeals of the State of New York from the judgment entered upon the decision of the general term of the supreme court, in favor of the plaintiffs and respondents herein, against the defendant and appellant herein, on the 10th day of February, 1873, for the affirmance of a former judgment in this action,

entered on the 14th day of September, 1872, in favor of the plaintiffs and against the defendant, and for the sum of $71.71 costs on appeal therefrom; and this defendant and appellant appeals from each and every part of said judgment.

Dated February 20, 1873.

Yours, &c.,

BROWN, HALL & VANDERPOEL,
Attys. for Deft. and Appel'nt.

To G. P. HAWES, Esq.,
Atty. for Resp'nts, and to

CHARLES E. LOWE, Esq.,
Clerk of said Court.

(Endorsed:) Filed March 3, 1873.

32 STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal and judgment-roll on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 4th day of March, A. D. 1873.

[L. S.] CHAS. E. LEOW, *Clerk.*

Supreme court, city and county of New York.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin, respondents,
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York, appellant.

CITY AND COUNTY OF NEW YORK *ss:*

J. Sterling Smith, of said city, being duly sworn, says: I am one of the attorneys for the appellant in the above action. The reasons of the court below for its decision cannot be procured. No opinion in the cause, either at special or general term, was ever rendered.

J. STERLING SMITH.

Sworn before me this 5th day of March, 1873.

ERNEST G. STEDMAN,
Notary Public, N. Y. Co.

33 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 7th day of October, in the year of our Lord one thousand eight hundred and seventy-three, before the judges of said court.

Witness the Hon. Sandford E. Church, chief-justice, presiding.

E. O. PERRIN, *Clerk.*

Remittitur, Oct. 14th, 1873.

GEORGE M. WELD & OTHERS, RESPONDENTS,
against
JAMES O'BRIEN, SHERIFF, &C., APPELLANT.

Be it remembered that on the 6th day of March, in the year of our Lord one thousand eight hundred and seventy-three, James O'Brien, sheriff, &c., the appellant in this action, came here into the court of appeals, by Brown, Hall & Vanderpoel, his attorneys, and filed in
34 the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court, first judicial department of the State of New York; and George M. Weld and others, the respondents in said action, afterwards appeared in said court of appeals, by G. P. Hawes, their attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. A. J. Vanderpoel, of counsel for the appellant, and by Mr. Granville P. Hawes, of counsel for the respondents, and, after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed. And it was further ordered and adjudged that the respondents recover against the appellant costs of appeal to this court.

And it was further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered, that the said judgment be in all things
35 affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, Oct. 14th, 1873.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

(Endorsed:) Filed October 17, 1873.

36 At a general term of the supreme court of the State of New York, held in and for the city and county of New York, at the court-house in said city, on the thirteenth day of November, 1873.

Present, Hon.

GEORGE M. WELD, HENRY W. NAGLE, AND Edwin Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.

The defendant, James O'Brien, having appealed to the court of ap-

peals of the State of New York from the judgment entered upon the decision of the general term of this court in favor of the plaintiffs herein, against the defendant herein, on the 10th day of February, 1873, for the affirmance of a former judgment in this action, entered on the 14th day of September, 1872, in favor of the plaintiffs against the de-
37 fendant, and for the sum of seventy-one dollars and seventy-one cents, and said court of appeals having affirmed the judgment of this court aforesaid—

Now, on reading and filing the remittitur from said court of appeals, and on motion of Granville P. Hawes, of counsel for the plaintiffs, it is adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the judgment of this court, appealed from as aforesaid, be, and the same is hereby, affirmed, and that the plaintiffs recover of the defendant their costs of appeal to said court of appeals.

(Endorsed:) Filed Nov. 24, 1873.

38 Supreme court, city and county of New York.

GEORGE M. WELD, HENRY W. NAGLE, AND Edward Sherwin
against
JAMES O'BRIEN, SHERIFF OF THE CITY AND county of New York.
} Judgment.

An appeal from the judgment entered in this action on the 14th day of September, 1872, in favor of the plaintiffs and respondents and against the defendant and appellant, having been taken by said defendant and appellant to the court of appeals of the State of New York, and said court of appeals having affirmed said judgment in all respects, with costs, and having remitted to this court the proceedings had in said court of appeals herein, and this court having, on the 13th day of November, 1873, made an order that the judgment of said court of appeals be made the judgment of this court, and that the plaintiffs and respondents recover from the defendant and appellant their costs of said appeal, and said costs having been adjusted by the clerk of this court:

39 Now, on motion of Granville P. Hawes, esqr., attorney for the plaintiffs and respondents, it is adjudged that the plaintiffs and respondents, George M. Weld, Henry W. Nagle, and Edward Sherwin, do recover from the defendant and appellant, James O'Brien, the sum of one hundred and twenty-six dollars and seventy-five cents, their costs of said appeal as adjusted.

(Endorsed:) Filed Dec. 4, 1873, 1 h. 21 m.

40 Copy of opinion rendered at general term reversing the order overruling plaintiff's demurrer to second defence in the answer.

GEORGE M. WELD, &c.,
vs.
JAMES O'BRIEN, SHERIFF, &c.

INGRAHAM, P. J.
CARDOZO, J.:

The precise point involved in the case was decided in the general term, (Nov., 1871,) in The Tenth National Bank vs. Sanger, &c.

It was there held that the bankrupt court could not, by injunction, prevent this court from making the proper order as to the distribution of money which the sheriff held on process which had issued to him from this court.

We think the point perfectly clear, and it leads to the reversal of the order below.

41 Court of appeals.

WELD, RESPT.,
vs.
O'BRIEN, APPLT.

PECKHAM, J.:

The case of Marshall v. Knox, recently decided by the Supreme Court of the United States, disposes of every question presented upon this appeal.

It is a sound decision, and requires no comment.

The judgment must be affirmed, with costs.

"Church, Ch. J.; Folger & Grover, JJ., concur; Allen, J., dissents; Andrews, J., not voting; Rapallo, J., absent."

A copy, but not for publication.

H. E. SICKLES,
Reporter.

(Indorsed:) U. S. Supreme Court. James O'Brien, plff. in error, against George M. Weld, defts. in error. Writ of error and return.

(Indorsement on cover:) No. 208. James O'Brien, plff. in error, vs. George M. Weld, Henry W. Nagle, and Edwin Sherwin. New York sup. court. Filed 20th July, 1874.

Martin B. Brown, Law Printer and Stationer, 201 and 203 William street.

U. S. Supreme Court.

GEORGE M. WELD and others, Defendants in Error, *against* JAMES O'BRIEN, Sheriff of the City and County of New York, Plaintiff in Error.	No. 208. Points for Plaintiff in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK, ENTERED ON REMITTITUR FROM THE COURT OF APPEALS.

Statement.

1—Trial before Brady, J., and a jury (22).

2—Verdict ordered for plaintiffs (23, 27).

3—Affirmed on appeal to General Term (29).

4—Appeal to Court of Appeals by defendant (31).

Judgment of affirmance by Court of Appeals (34).

Opinion of Court of Appeals (41).

The direction to render a verdict for the plaintiffs was in conformity with a decision of the General Term, sus-

taining a demurrer to the second defence interposed by the answer of the defendant (26).

Opinion of General Term (40).

The order thus made in the case by the General Term reversed an order of the Special Term which determined the main issue in the action. At the Special Term, the plaintiff's demurrer to the second defecne in the answer of defendant (24) was overruled, but the General Term on appeal therefrom held the plaintiff's demurrer well taken, and reversed that order.

Thereupon the parties in due time went to trial, and a verdict was directed for the plaintiff.

From the judgment entered thereupon the defendant in that action appealed to the Court of Appeals.

The appeal brought the said judgment and the orders of the General Term sustaining the demurrer before that Court for review.

New York Code, § 11, sub. 2. § 329.

The complaint (fol. 10) sets forth that the plaintiffs issued to the defendant three executions: one, March 17, 1870, against the property of Albert Wiltse and Frederick Wiltse; one, March 18, 1870, against the same debtors; and one on the same day against Frederick Wiltse. That the defendant collected and received on said executions to the use of the plaintiffs the sum of $1,404.72, and that, although more than sixty days had elapsed, the defendant had failed to pay the same to the plaintiffs (11).

The answer (fol. 11) put in issue all of the allegations of the complaint except the receipt of the executions by the defendant (11, 15).

For a second defense (14), averred that on the 24th day of March, 1870, a petition in bankruptcy was duly filed, at the suit of a creditor, against said Frederick Wiltse, and

on the same day an injunction was issued out of the Bankruptcy Court and served on defendant, addressed to the bankrupt, to this defendant, and to the plaintiffs in the several executions, restraining him as such sheriff and the plaintiffs in said executions until the hearing and decision on the said petition (that Wiltse be declared a bankrupt), and until the further order of the Court from making any transfer or disposition of any of the property of the said debtor not exempted from the operation of the bankrupt act, and from any interference therewith, except to preserve the same until the further order of the Court.

Copy injunction (16).

That afterwards the plaintiffs, in the executions and in this action presented their petition to the said bankruptcy court for a modification of said injunction, on which an order was made (Ex. B, fol. 17).

The said Bankruptcy Court also issued its second injunction order on the 7th day of April, 1870, restraining the sheriff and the plaintiffs in the executions from selling or making any transfer of a certain coal yard, etc., under the said executions issued to him by said plaintiffs, as aforesaid "the property of the above named bankrupt (Frederick Wiltse), but nominally the property of one Albert Wiltse" (Ex. C, fol. 19).

The plaintiffs also applied to the said Bankruptcy Court by petition to grant a further order, the petitioning creditors in bankruptcy opposed the application, and after hearing counsel for the respective parties the Court made its order (Ex. D, fol. 20).

These several orders were served upon the defendant, and in pursuance thereof the defendant sold the property and deposited the proceeds with the clerk of the Bankruptcy Court (15).

The plaintiffs demurred to this second defense on the broad ground that it did not constitute any defense to the

action (22). The issue raised by the demurrer was heard at Special Term and the demurrer was overruled. The plaintiffs appealed from that order to the General Term, and the General Term reversed it.

After the reversal of said order by the General Term, the action was brought to trial upon the issues of fact raised by the answer, before Justice Brady and a jury (22).

The defendant then called a witness and offered to prove the allegations set forth in the said second defence of the answer, and separately offered to prove each and every of said allegations. The plaintiffs' counsel objected thereto and objected to any proof being given under said allegations or either of them, on the ground that they constituted no counter-claim or defense to the plaintiffs' action. It was admitted by the parties that the General Term had sustained a demurrer to said second defence on said grounds. The Court excluded the evidence upon plaintiffs' objection, and the defendant excepted (23). Exception was duly noted.

The judgment-rolls and executions mentioned in the complaint having been produced in evidence on the trial, the Court directed the jury to find a verdict for the plaintiffs for $5,096.58, and the jury so found. Judgment was entered thereon September 14, 1872 (67, 59), and the defendant appealed to the General Term, where the judgment was affirmed.

The Court of Appeals affirmed this judgment. Judge Allen dissented. Judges Andrews and Rapallo took no part in the decision.

The judgment was remitted to the Supreme Court (34, 37).

The defendant (sheriff) obeyed the orders of the bankruptcy court, as they were procured on applications of the execution creditors, and the question now presented is, whether, having done so, he is liable to the said creditors for the amount of the proceeds which he paid into the

Bankruptcy Court, pursuant to the direction contained in the said orders of that Court bearing date April 11, 1870 (17), and July 6, 1870 (20).

Assignment of Errors.

The plaintiff in error assigns the following as the errors on which he relies.

1. That there is error in this, that the said judgment of the said Court of Appeals, of the State of New York, affirmed the judgment of the Supreme Court of said state, instead of reversing it (28, 34).

2. That there is error in the judgment and proceedings of the said Supreme Court (fols. 27, 28), so affirmed by the said Court of Appeals, in this, to wit:

   (1.) In that it sustains the demurrer to the second defence of the defendants' answer, interposed on the ground that said second defence "does not "upon its face constitute a counterclaim or "defence to the complaint in this action." (Fols. 22, 26.)

   (2.) In reversing the order of the Special Term overruling said demurrer (fols. 24, 26).

   (3.) In excluding the evidence offered by the defendant on the trial, to prove the allegations set forth in the said second defence in his answer, and his separate offers to prove each and every of such allegations, to which rulings the defendant duly excepted (23).

   (4.) In directing a verdict for the plaintiff.

3. That there is error in the judgment (28), and order (26) of the Supreme Court of New York, which are affirmed by the judgment of the Court of Appeals (34), in that the injunctions and orders issued by the bankruptcy court, and set forth as a second defence in the answer (16 to 22), are by said judg-

ment and order adjudged void, and to have been issued by the bankruptcy court without jurisdiction, whereas the bankruptcy court had jurisdiction to issue them, and they were valid.

4. Also, there was error in this that the court below gave judgment for the plaintiffs (defendants in error) on the ground that the injunctions and orders of the bankruptcy court which the defendant (Sheriff) set forth in his second defense were invalid and afforded no protection to the Sheriff, whereas, the said plaintiffs were estopped from denying the validity of said orders and injunctions, and from denying the jurisdiction of the court which issued them.

5. That there is error in the judgment entered by the Supreme Court of the State of New York, upon the remittitur from the Court of Appeals for the reasons hereinbefore assigned (38).

First Point.

The orders of the Bankruptcy Court having been granted on the application of the defendants in error, and the Sheriff having complied therewith, the said orders are a complete protection to the Sheriff against the defendants in error in this action.

1. We submit that Marshall *vs.* Knox, 16 Wallace, 551 (decided intermediate the argument and decision of this case in the Court of Appeals), does not control the present case.

In Marshall *vs.* Knox, the Sheriff had been forced into the bankruptcy court, and his rights to property had been adversely adjudged in a summary way, and this Court held that the bankruptcy

court had acted without jurisdiction, because, "strangers to the proceedings in bankruptcy not "served with process, and who have not voluntarily "appeared and become parties to such litigation, "cannot be compelled to come into court under a "petition for a rule to show cause."

Smith *vs.* Mason, 14 Wallace, 419.

The case at bar is distinguished from Marshall *vs.* Knox, in the following essential particulars, viz.: (1) The creditors, if they can be called "strangers" here voluntarily sought the jurisdiction of the Bankruptcy Court, and appeared therein and asked for the orders, which they now seek to repudiate. (2) The orders do not adjudge nor adjudicate upon the rights of the parties to the proceeds of the sale.

2. The effect of a voluntary appearance and consent in a summary application in bankruptcy was discussed by the General Term of New York Supreme Court, First Department, in the case of the People *ex rel.* Jennys *vs.* Brennan, reported in 3 Hun. (10 N. Y. Supreme Court Reports), 666; and in 12 National Bankruptcy Register, 567.

A petition had been filed and a rule obtained by the assignee requiring Mrs. Jennys, the execution creditor, and Sheriff Brennan to show cause why certain moneys in the Sheriff's hands collected under an execution should not be paid to said, assignee in bankruptcy. The parties appeared on the return day, and all of them, including the execution creditor consented to the entry of an order of reference in the matter to a Register in bankruptcy.

On appearing before the referee the attorney for the execution creditor objected to proceeding further on the ground that the Court had no jurisdiction under the petition, but the assignee should file a bill in equity. After taking the objection he

proceeded, and the same point was taken by him on the final argument before Judge Blatchford. Judge Blatchford retained jurisdiction and directed the Sheriff to pay the money to the assignee, and the Sheriff paid the money accordingly. While that proceeding was pending in the bankruptcy court the execution creditor obtained an order from the New York Supreme Court, at Special Term, requiring the Sheriff to pay the money to her, but the Sheriff, being enjoined by the bankruptcy court, did not obey the order.

After the final decision in the Bankruptcy Court and the payment of the money by the Sheriff to the assignee, the execution creditor took proceedings in the Supreme Court to punish the Sheriff for contempt in not having paid the money to her on the execution.

Held at General Term—reversing the Special Term—that the voluntary appearance in the bankruptcy court and the consent to the entry of the order of reference gave that court jurisdiction, and the payment by the Sheriff of moneys as directed by the order made therein was a valid payment, and the Sheriff was discharged.

Mr. Justice Daniels who wrote the opinion, cites Marshall *vs.* Knox, and points out the foregoing distinction between the two cases, and cites, also, various other authorities bearing upon the question to which we refer.

3. The orders made in the present case by the Bankruptcy Court did not attempt to adjudicate upon the rights of the parties. The execution creditors claimed a lien upon the property in the Sheriff's hands by virtue of a levy, and being restrained by injunction from enforcing such lien they applied to the Bankruptcy Court for a modification of the injunction so as to allow the Sheriff to sell and pay

the proceeds into the Bankruptcy Court. After the Bankruptcy Court received the moneys, the said creditors could apply to that court for payment of their lien, and to allow them to recover against the Sheriff might enable them to obtain the money twice over.

4. Those orders were in effect instructions to the Sheriff by the said plaintiffs to do as therein directed, and the Sheriff was required to conform to such instructions and could not disregard them except at his peril.

> "The party in whose favor process issues may give such instructions to the Sheriff as will not only excuse him from his general duty, but bind him."

Root *vs.* Wagner 30 N. Y. Rep., 17.

5. The Sheriff having obeyed the orders of the bankruptcy court, the defendants in error are estopped from denying the validity of those orders.

> "When a person tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adverse claim."

Swain *vs.* Seaman, 9 Wallace 254, 274.

6. A party who has had notice of and been heard upon a motion is bound by the decision.

Acker *vs.* Ledyard, 8 N. Y, 62.

A fortiori, will this rule be applied against the party upon whose motion the order was granted, and in favor of an officer who has acted on the order.

7. The rule is well established that a party who obtains the benefit of an order, and accepts the benefits, or receives the advantages of it, is precluded from denying the authority which granted it. In the present case the defendants in error desire the benefit of the order so far as it placed the money in the hands of the Sheriff, and would repudiate it as to the balance.

Glackin *vs.* Zeller, 52 Barb., 147.

8. "It is not competent for a party to assent to a proceeding in the court below, take his chances of success, and, upon failure, come here and object that the court below had no authority to take the proceeding."

Mays *vs.* Fritton, 20 Wall, 418.

Nor can he take the objection in a collatoral action.

Augustin Assignee *vs.* McFarland, 13 Nat. Bk., Reg. 7.
Johnson *vs.* Worden. id. 335.

And in a collateral action every presumption is in favor of the validity of the prior proceeding.

New Lamp Chimney Co. *vs.* Ansonia Brass and Copper Co. U. S. Supreme Court, 13 Bk., Reg. 385.

Second Point.

The Bankruptcy Court had jurisdiction to issue the injunctions, and the injunctions were not vacated.

Bankrupt Act of 1867, §§ 1, 40.
R. S., §§ 4972–5024.

Hemming Canal Bk. Judson
4 Seld - 8 N. Y. 254. 262. 3
Fuller v Hepburn 48 N. Y. 41

The power of the bankruptcy courts to enjoin a sheriff has been sustained and exercised by the judges of the United States courts generally, and is well established.

In re. Mallory, 1 Sawyer, U. S. Rep. 88, 98.
Same case, 6 Nat. Bk. Reg., 22.

In the above case an injunction was issued by Judge Hillyer, of the District Court of Nevada, after a full and careful examination of the authorities, and his decision was affirmed and his reasoning adopted by Mr. Justice Field, of the U. S. Supreme Court, sitting at Circuit. (See note at end of said case.)

In re. Clark, 9 Blatchford, 372, Judge Woodruff held that under the 1st section of the Bankrupt Act, the District Court has ample power to restrain a claimant of a lien upon the bankrupt property from proceeding elsewhere to enforce his lien.

In *Mills* vs. *Davis*, decided by the General Term of the Superior Court, it appeared that an injunction had been issued to the Sheriff in proceedings against the execution defendant. After the service of the injunction, the Superior Court at Special Term granted an order that the Sheriff pay over to them the money held by him under the execution. The Sheriff appealed from the order, and in March, 1873, the General Term reversed the order.

3. Jones and Spencer (35 Superior Court), 355, approved in the Court of Appeals, 53 N. Y. Reports 349.
Same Case, 10 Nat. Bk., Reg. 340.

Under the Bankruptcy Act of 1841 the power

and jurisdiction of the District Courts to issue injunctions was recognized and acknowledged.

Ex parte Fleming, 4 Hill, 581.
Burt *vs.* Mapes, 1 Hill, 649, 651.

The injunctions never having been vacated they were a defence to this action, in case the orders modifying them were void.

The General Term based its decision in this case on the ground that the Bankruptcy Court could not enjoin the Sheriff (fol. 140), or held, in other words, that the orders were void.

Third Point.

The Bankruptcy Court, having issued the injunctions, had jurisdiction to modify them so as to allow the Sheriff to sell the property covered thereby and hold the proceeds; or, on application of the plaintiff in the execution, could direct the Sheriff to pay the proceeds into that court.

1. Notwithstanding the levy, the general property in the goods remained in the debtor, and passed to his as signee subject to the lien of the levy.

Giles vs. *Giles*, 1 *Clark and Fin. App. Cases*, 72, 76.
In re Wynne, 4 *Bk. Reg.*, 6.

2. The Bankruptcy Court had jurisdiction to ascertain and liquidate all liens, and specific claims upon the property (*R. S.*, § 4972) and could sell property free from liens, and, though it might not have had power to summarily order the proceeds of this property into its custody, if resisted by the execu-

tion creditors; yet, on the application of those creditors, it could take the proceeds, subject to the lien, and administer them.

In re Clark, 9 Blatchford, 372.
In re Kahley, 4 Nat. Bk. Reg., 378–383.
In re Columbian Met. Works, 3 *id.*, 75.
In re Loeb, 1 *id.*, 481.

Fourth Point.

The defendants in error were not injured nor prejudiced by the payment of the proceeds into the bankruptcy court, but it was for their advantage as well as upon their application.

1. The lien of the execution, if honest, was preserved by the Bankrupt Act; it attached to such proceeds, and the bankruptcy court would order the payment of it to the plaintiffs upon application.

2. If the lien was in fraud of the Bankrupt Act, the plaintiffs would have no right to the money, and the assignee could have recovered the said proceeds from the Sheriff, had he retained them.

Warren *vs.* Tenth Nat. Bank, 7 Bank Reg., 481.

Clarion Bk. *vs.* Jones, 21 Wall, 323.

And if the Sheriff had paid the proceeds to the plaintiffs, the assignee could have recovered them from the plaintiffs.

Traders' Bank *vs.* Campbell, 14 Wallace, 87.

3. The orders required the proceeds to be placed in the custody of that court. Any party claiming such proceeds, or any part of them, could then present

such application to that court. The result of allowing the Sheriff to retain the possession of the property would have been to render him a necessary party to any suit or proceeding concerning it. This would have been of no advantage to the plaintiffs. The plaintiffs in the execution were thereby relieved of the injunction, and could apply to the Bankruptcy Court for payment to them at any time.

Fifth Point.

The judgment below should be reversed, and the cause remanded for further proceedings.

A. J. VANDERPOEL,
of Counsel for the
Plaintiff in Error.

Jurisdiction
Dupasseur v Rochereau
21 Wall 130
Matthews v McStea
20 Wall 646
RR Co v Maryland
20 Wall 643

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

JAMES O'BRIEN
Plaintiff in Error,

agst.

GEO. M. WELD ET AL.,
Defendants in Error.

Points for Defendants in Error.

Statement of Facts.

This is an action brought to recover $4,404,72 collected by the plaintiff in error as sheriff under three executions, two of which were issued on judgments entered in favor of the defendants against Frederick Wiltse and Albert Wiltse jointly and severally for $2,-583.35, one of which was issued on a judgment entered in favor of the defendants against Frederick Wiltse alone for $5,438.94 (folios 10 and 11), amounting in all to $8,022.29.

The defense relied upon is that the plaintiff in error, under certain orders made by the United States District Court for the Southern District of New York,

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in a proceeding in bankruptcy against Frederick Wiltse alone paid over to the clerk of that court the moneys arising from the sale of the property of Frederick and Albert Wiltse taken by him under such executions (fols. 14 to 20).

The petition in bankruptcy against Frederick Wiltse was filed subsequently to the levy and seizure under the executions (fols 10 11 and 14).

At the time of the filing of the petition in bankruptcy the Bankrupt Court made an order (fol. 16) restraining the plaintiff in error from making any transfer or disposition of any of the property of the said debtor, Frederick Wiltse, not exempted, &c., until the further order of the court.

The defendants thereafter applied to the Bankrupt Court asking that the injunction be so far vacated or modified as to allow the plaintiff in error to sell the property levied on by him under the executions issued on the judgments against Frederick Wiltse.

This application was granted, but the Bankruptcy Court, of its own motion and without any acquiescence or consent on the part of the defendants, made a further order that the sheriff pay over the money received from the sale of the property after deducting his fees, &c., to the clerk of the U. S. District Court, to await the further order of that court (fol. 18).

Upon the application of the petitioning creditor an order was made restraining the plaintiff in error, as such sheriff, from selling or making any disposition of certain property therein described " as nominally the " property of one Albert Wiltse " under the executions issued upon the judgments entered in favor of the defendants in error, and against Frederick and Albert Wiltse (fol. 19).

An application was thereupon made asking that this injunction be modified so far as to permit the sheriff to proceed with the sale of property belonging to Albert Wiltse. This application was also granted, but the Bankruptcy Court, as before, on its own motion and

without any acquiescence or consent on part of the defendants in error, made a further order that the proceeds of the sale should be paid over to the clerk of the U. S. District Court to the credit of the bankruptcy proceedings (fol. 21).

The defendants in error having demurred to the defense interposed upon these orders, such demurrer on appeal to the General Term was sustained (fol. 24).

No question was raised as to the validity of the judgments upon which the executions were issued.

The amount of the judgments was much more than the sums realized upon the sale, and there could therefore remain no balance in the hands of the sheriff after the satisfaction of the judgments to be paid over to the bankrupt or his creditors.

At the trial the regularity and the validity of the judgment rolls and the executions issued thereon were admitted (fol. 23).

The plaintiff in error offered to prove the allegations set forth in the second defense of his answer (fols. 23, 14 and 15), to which the defendant objected, and it being admitted that the General Term had reversed an order overruling the defendants' demurrer to such defense, the objection was sustained.

Judgment thereupon was ordered to be given for defendants in error, from which an appeal was taken to the General Term of the Supreme Court, where the judgment was affirmed.

From this affirmance an appeal was then taken to the Court of Appeals, where the judgment was again affirmed.

The judgment is now before this court on a writ of error to the Supreme Court on the judgment entered on a remittitur from the Court of Appeals.

First Point.

The orders of the Bankruptcy Court directing the plaintiff in error to pay over the moneys to the clerk of that court were void for want of jurisdiction, and constitute no defense to this action.

I.—The United States District Court sitting in bankruptcy is a court of limited jurisdiction, and a burden of proof is on the plaintiffs in error to show that the court had the authority to issue these orders.

R. S. U. S., title LXL, Bankruptcy, sec. 4972.

Exparte Hugh Campbell, 1 N. B. R., 165.

Clarke *vs.* Rist, 3 McLean, 494.

"A grant of power to the Federal courts, to have " the effect of divesting a State court of its primi- " tive jurisdiction or pre-existing authority, should " be direct and conclusive, and the exercise of it " by the State courts expressly prohibited."

Judicial Act of Congress, 1789, Federalist, No. 82.

2 Hill, 159.

1 Kent's Com., 443.

Houston *vs.* Morre, 5 Wheaton, 1.

The act conferring bankruptcy power limits the District Court to the " marshalling of funds and assets belonging to the bankrupt," and in only one instance does the act divest the State court of property which has passed out of the hands of the bankrupt, and is in the possession of the officers of the State court, and in this instance the grant is distinct and exclusive, and its exercise expressly *prohibited*, to wit,—goods and property in possession of the sheriff under " *mesne process.*"

Bankrupt Law, sec. 14.

The validity of all other processes is not only recognized, but the decisions of the Bankrupt Court, under the Law of 1841, as well as the present. have been uniform in its support.

Bankrupt Act, 1867, sec. 14.
Clark *vs.* Rist, 3 McLean, 494.
Ex parte Donaldson, 16 Am. L. R., 213.
In re Allen, 1 Leg. Obs., 115.

The explicit exception of "*mesne process*" only, is a positive expression by Congress, and it must be presumed that it expressed all that it intended, and by its silence excluded all other processes.

II.—A valid levy having been made under the executions previous to the filing of the petition in bankruptcy, the jurisdiction of the State Court attached to the property levied upon, and the title of the State Court and its officer is superior to that of the United States Court and its officer or its assignee in bankruptcy.

Marshall *vs.* Knox, 16 Wal.
Nilson *vs.* Childs, 8 N. B. R., 527.
In re Shaey, 9 N. B. R., 526.
Reed *vs.* Bullington, 49 Miss., 223.
Warren *vs.* Tenth Nat'l Bank, 5 N. B. R., 479.
Wilson *vs.* The City Bank, 17 Wal., 473.
Mallison *vs.* Eaton, 16 Minn., 430, and cases there cited.

This is true where the title to the property has been vested by a State Court in a receiver.

Alden *vs.* The Baston, H. & E. R. R. Co. 5 N. B. R., 230.
Goodrich *vs.* Remington, 6 Blatch., 515.

So in cases where an officer acting under the State court has acquired title by reason of a general assignment for benefit of the creditors.

Rogers *vs.* Winsor, 6 N. B. R., 246.
Meyer *vs.* Hellman, Alb. L. J., Mich., 1876.

This was true under the Bankrupt Act of 1841 in States where the execution was a lien.

Wallace *vs.* Burt, 3 How., 111.
Ex parte Donaldson, 16 Am. L. R., 213.
Foulger *vs.* Taylor, 5 H. &. M., 202.
Pierce *vs.* Scott, 4 W. and S., 344.
Milliken *vs.* Selye, 6 Hill., 623.
Buckley *vs.* Snouffer, 10 I. M., 149.

The lien of the judgment and the rights of the execution creditor are also respected and sustained under the English Bankrupt Act of 1869.

In re Villers, 9 L. R., Chan. App., 432.

III.—But if the bankrupt court had authority to take the possession and control of the property from the custody of the State court, it *could* do so only in a suit at law or equity, and not by a summary proceeding, and any order made in any such summary proceeding is absolutely void.

Marshall *vs.* Knox, 16 Wal., 551.
In re Master, 10 N. B. R., 185.
Smith *vs.* Mason, 14 Wal., 419.
Wilson *vs.* City Bk., 17 Wal., 473.
Carr *vs.* Hilton, 1 Curt., 233.
Irving *vs.* Hughes, 2 N. B. R., 62.
In re Kerosene Oil Co., 3 N. B. R., 125.
S. C., 6 Blatch., 521.
In re Bonesteel, 2 N. B. R. 517.
Barstow *vs.* Peckham, 5 N. B. R., 72.
Knight *vs.* Cheeney, 5 N. B. R., 305.
Rogers *vs.* Winsor, 6 N. B. R., 246.
In re Shuey, 9 N. B. R., 526.

In the case Mills *v.* Davis, relied upon by plaintiff in error, the question was never presented to the Court of Appeals, that court having decided that the order appealed from was not appealable, and subsequently in an action against Brennan,

sheriff, similar in all respects to this, and defended by same counsel, judgment was obtained and satisfied.

IV.—Inasmuch as no question as to the validity of the judgments is raised on the record, and no presumption against their validity exists (Wilson *v.* City Bk., 17 Wal., 473), the Bankruptcy Court can have no shadow of title to any portion of the fund, except such as might remain after the satisfaction of the judgments, there could be no such residuum in this case.

There is nothing upon the records showing a claim of title in the assignee; upon what theory, then, can a Bankrupt Court ask for the custody of a fund in which neither the bankrupt or assignee could show an apparent interest.

V.—The orders required the plaintiff in error to pay over moneys collected on a judgment against Albert Wiltse, a stranger to the bankruptcy proceedings (fols. 14, 19 and 21).

If this was done on the assumption that the apparent owner was not the true owner, the court had no power to arrive at such a conclusion on ex-parte proceeding.

Penny *vs.* Taylor, 10 N. B. R. 200, and cases cited, point 3.
Marsh *vs.* Armstrong, 11 N. B. R., 126.
In re Harthill, 4 N. B. R., 392.
Leighton *vs.* Harwood, 101 Mass., 67.

VI.—The court below held that the United States Court had no authority to take property summarily from the possession of the sheriff or to compel the sheriff as an officer of another court to do any affirmative act.

It did not rule upon the question of the power of the United States Court to grant an injunction

against the sheriff, nor upon its power to vacate said injunction.

That the Bankrupt Court, however, has no jurisdiction to enjoin a sale by an officer on process issued from State courts, see following cases:

In re Cabria, 1 Wash., 232.
Sawyer *vs.* Gill, 3 W. & M., 97.
Brown *vs.* Swan, 10 Peters, 497.
Marshall *vs.* Beverly, 5 Wheat., 313.
Ruggles *vs.* Simonton, 3 Biss., 325.
McKim *vs.* Voorhies, 7 Cranch., 979.
Irving *vs.* Hughes, 2 B. R., 20.
See 4 Cranch., 179.
See 7 How., 612.

Second Point.

The mere fact that the defendants in error appeared in the Bankrupt Court for a specific purpose set forth in their petition, asking the court to vacate its own order, and permit the sheriff to execute the orders of the State Court, in no respect confers jurisdiction upon the Bankrupt Court to summarily possess itself of the property.

The case of Jenny *vs.* Brennan, sheriff (a General Term decision in the court below) differs from the case at bar in every essential particular. In that case all the parties were brought in by a petition setting forth all the facts in the case, which petition showed that there were different parties claiming the fund. All the parties who could have any possible interest in the fund consented and agreed that the matters in controversy as shown by the petition, should be submitted to the register "for the purposes comprehended in the petition." It became a virtual arbitration as to the questions at issue set forth in the petition. The

appearance in the case at bar, so far as it was an appearance, was for a special and specific purpose, viz., asking that the injunction issued herein may be so for vacated or modified as to allow the sheriff of the city and County of New York to sell the property levied on by him previous to the filing of the petition in bankruptcy against the above named Frederick Wiltse (fols. 17 and 20); in other words, to allow the sheriff to do what in law he was bound to do under the order of the court of which he was an officer. This is all that appears in the record, and all that existed in fact. There was no notice that the title or control of the property was to be brought into question.

Assuming the law in Jenny *vs.* Brennan to be correct, an appearance in any event is only for the purposes comprehended in the petition. Would the special appearance for the purpose of vacating an injunction give the court jurisdiction to summarily possess itself of the property and dispose of it?

Would such an appearance give the court the right to take into its custody the property of Albert Wiltse, an entire stranger to all these proceedings?

It is submitted that such a limited appearance for such a special purpose confers no authority upon the Bankrupt Court to control the officer of another and foreign jurisdiction, to compel such officer to disobey the orders he was acting under, to advertise in such papers as the Brnkrupt Court might designate, to tax his costs under the regulations of the United States Court, and finally to pay to the clerk of the United States Court money to which, by the record, the Bankrupt Court had no claim of title.

The act itself was wholly void, and even a general appearance could not confer authority. Certainly a limited appearance clearly defined and for a specific purpose would not.

U. S. *v.* Yates, 6 How., 605.
Hodges *v.* Scott, 4 Green, 345.

Bank of Tenn. *v.* Anderson, 3 Suead., 669.
Mercia *v.* Chase, 9 Allen, 242.
Bellin *v.* White, 25 La. Ann., 624.
Camp *v.* Tibbetts, 2 E. D. Smith, 20.
People *v.* White, 24 Wend., 320.

As matter of fact the orders summarily taking possession of the property and disposing of it was made by the court on its own motion. The only parties who were before the court, even for the express and clearly defined purpose of modifying the injunction, were the defendants in error and the attorney for the petitioning creditor. The attorney for the petitioning creditor could not represent Frederick Wiltse who, so far as appears, was not adjudicated a bankrupt, and on the theory of the plaintiff in error, he had a general property in the fund or if he had been adjudicated, the assignee was not before the court. The sheriff was the bailee of the funds and had a special property therein. He was a stranger to the bunkruptcy proceeding and was not brought in by summons or petition, nor is it claimed that he ever appeared in the proceeding, directly or indirectly. Albert Wiltse was an absolute stranger to the bankruptcy proceeding in every possible phase of the case. He neither appeared nor had notice, yet his property, held by the sheriff to pay his debts, was seized by the court without notice, and has been used to pay his brother's debts, the money arising from the sale of his property being "turned over to the credit of this proceeding."

None of these parties were before the court for any purpose whatever. They were not served with process nor did they voluntarily appear.

Marshall *vs.* Knox, 16 Wal.
Smith *v.* Mason, 14, Wal.

Third Point.

It is claimed, however, that admitting it to be true that the court had no jurisdiction, yet the defendants in error, by appearing in the Bankrupt Court for the purpose of modifying the injunction so as to allow the sheriff to sell, have so acted as to be estopped from denying its jurisdiction.

A party relying on matter of estoppel must plead it if he have opportunity ; if not, it may be given in evidence under the general issue.

Howard *vs.* Mitchell, 14 Mass., 241.
Isaacs *vs.* Clark, 12 Vt., 692.
McNair *vs.* O'Fallon, 8 Mo., 198.
Lord *vs.* Bigelow, 8 Vt., 461.

No evidence of estoppel in this case was offered under the general issue, neither is it pleaded specifically as an estoppel under the second defense of the answer of plaintiff in error.

If the matter is not expressly and precisely alleged it will be no estoppel.

Guild *vs.* Richardson, 6 Pick., 364.
Crandall *vs.* Gallop, 12 Conn., 365.

An estoppel cannot be taken by inference, it must be relied on in the pleadings

Randall *vs.* Montgomery, 2 John., 362.

The rule that if a party to an action proceeds upon an order made in the cause or accepts any benefit or advantage under it, he will be precluded from asking its review, is confined to those cases only in which the party has acted or received the benefit or advantage. In this case there is no evidence that the defendant in error acted on an order of the United States Court or that he directed the plaintiff in error to do so or that he acquiesced in any respect to this order.

Neither did the plaintiff in error in paying over the money act on the admission and direction of the de-

fendants, but if at all upon the "*further order*" of the Bankrupt Court (fols. 17 and 21), to which order plaintiff in error are in no sense parties.

The very answer of plaintiff in error shows that he relied upon the act of the United States Court, and not upon the act of the defendants in error; for he sold said goods "in obedience to said orders of said District Court," and paid out said moneys "as by said orders directed." If he relied upon any act of the defendant, that was a question of fact, essential to the proof of the estoppel, and to be presented to the jury. If any evidence of that kind had been presented, the defendant might have met it at the trial, by showing such positive instruction to the plaintiff in error as would have convinced the jury that the plaintiff in error could not have relied upon any act of defendants in paying over the money, as was really the fact in the case.

Edge *vs.* Parker, 8 B and C, 697.
Leighton *vs.* Harwood, 15 American Reports, 7.

The facts necessary to work an estoppel must appear affirmatively.

Hill *vs.* Epley, 31 Pa., 311.

No proof of estoppel was offered at the trial (see fol. 23). The plaintiff in error was not debarred from offering such proof if he had it, under the general issue. Moreover, it is too late for the plaintiff in error to raise this point here.

It might have been raised at the trial, but was not, and its consideration was consequently disregarded in the apellate courts below.

To be available here an objection must have been taken in the court below, and unless so taken it will not be heard here.

Brockert *vs.* Brockert, 3 How., 692.
Bell *vs.* Brown, 1 How., 169.
May *vs.* Frittons, 20 Wallace, 414.

Affirmative relief cannot be granted to a party

opposing a motion when the moving party has no opportunity to answer.

Garcia *vs.* Sheldon, 3 Barb., 232.

An order granting the moving party a favor is not imperative upon him unless so expressed.

Neil *vs.* Weust, 17 Abbot, 319.

And yet the plaintiff claims that the defendants shall be bound by an order, which not only does not expressly bind them, but which is hostile in its character, and of which they did not and could not avail themselves.

A party submitting to the jurisdiction of a court, cannot be bound by any order which affects questions growing indirectly out of it.

Opinion of Judge Sill in Garcia *vs.* Sheldon, 3 Barb., 232.

To create an estoppel, the party against whom it is to be enforced must by his act, either of omission or commission, have induced the other party to act, but by what act of defendants in error was the sheriff induced to part with the money? The issuing of the injunction was *ad invitum;* its modification as asked was in perfect harmony with the relation of the parties; the modification sought did not aim to or desire that the sheriff should part with the property. The order to pay over the money to the United States Court was in direct antagonism to the relief sought; it was neither asked, consented to or acquiesced in; neither is there evidence to show that the sheriff knew the order to have been made on application of defendant in error, or that he acted on the strength of any relation which defendant in error sustained to the order. On the contrary, as a matter of fact, he had full notice that the defendant in error did not acquiesce in the order, and that the sheriff would be held responsible if he acted upon it.

By what possible act is the defendant in error estopped? Certainly not by applying for the order permitting sheriff to sell, for that was in the course of the sheriff's duty under the execution; and not by the subsequent or further order, for that was not part of the order sought by them, nor granted on his application, or acquiesced in, as a condition upon which the order to sell should be granted.

Fourth Point.

Is there a Federal question before this court for review, and if so what is it?

I.—There is no Federal question presented here under Section 709, R. S. U. S.

Sec. 25 of the Act of 1789 has been repealed.

Murdock *vs.* City of Memphis, 20 Wall., 617.

The power of the court, therefore, to review a judgment "when is drawn in question the *construction* of any clause of the constitution or of a treaty or *statute of* or commission held under the United States," has been abrogated, and this court has jurisdiction only to review a judgment where is called in question the validity of a treaty or *statute of* or an authority exercised under, the United States."

"That which is omitted ceased to have any effect from the day that the substituted statute was approved."

Murdock *vs.* City of Memphis, 20 Wal., 617.

II.—But if any question is presented to this court for review, it is the single question whether, under

the Bankrupt Act, the United States District Court had the authority to issue the orders pleaded by way of defense. The question has been answered adversely to the plaintiff in error, in Knox *v.* Marshal.

1. The question whether the U. S. Court acquired jurisdiction of the person is not a Federal question.

   The effect of a voluntary appearance as conferring jurisdiction of the person is purely and wholly a question to be determined by the rules of the common law.

   The determination of this question does not draw in question the validity of any statute of the United States or any authority exercised under the United States.

   The court below decided that the U. S. Court never did acquire jurisdiction in these proceedings. It held that the limited appearance for the purpose of moving to vacate the injunction did not confer jurisdiction upon the U. S. Court sufficient to bind the parties by its subsequent orders.

   In arriving at that conclusion no reference to the Bankrupt Act or to any other statute or authority of the United States was necessary.

2. The question whether the defendants in error are estopped from denying the power of the Bankrupt Court by any act of theirs is not a Federal question.

   An estoppel in pais is a mere question of fact dependent upon time and circumstances, to be determined under the rules of the common law, and the various State statutes.

   It calls in question the validity of no statute of the United States, nor does it raise any issue which may be presented to this court for review under sect. 709, R. S. U. S.

The State courts are the appropriate tribunals to determine a matter of this kind, and they have determined it?

Fifth Point.

The judgment below should be affirmed.

GRANVILLE P. HAWES,
Of Counsel for the Defendants in Error.